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(RPT 09 0022 B)

PATENT APPLICATION

09/692,884

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Kenneth R. Owens, et al.
Serial No.: 09/692,884
Filing Date: October 20, 2000
Examiner: Jason E. Mattis
Art Unit: 2665
Title: METHOD FOR ESTABLISHING AN MPLS DATA
NETWORK PROTECTION PATHWAY

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

REQUEST FOR PRE-APPEAL BRIEF REVIEW

In response to the Advisory Action mailed November 10, 2005, Applicant respectfully requests a Pre-Appeal Brief review of this Application so that the rejection of the claims and the objections to the Application can be reconsidered prior to submission of an Appeal Brief.

REMARKS

This Request for Pre-Appeal Brief Review is being filed in accordance with the provisions set forth in the Official Gazette Notice of July 12, 2005. Pursuant to the Official Gazette Notice, this Request for Pre-Appeal Brief Review is being filed concurrently with a Notice of Appeal. The Applicant respectfully requests reconsideration of the Application in light of the remarks set forth below.

Claims 1, 2, 4, 5, 7-11, and 13-24 currently stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al. in view of McAllister, et al. Claims 3 and 12 currently stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al. in view of McAllister, et al. and further in view of Aukia, et al. Claim 6 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al. in view of McAllister, et al. and further in view of Lemieux. In the prosecution of the present Application, the Examiner's rejections and assertions contain clear errors of law, including a failure to establish a *prima facie* case of obviousness. To assist the Panel in the review of this Request for Pre-Appeal Brief Review, Applicant submits the following brief summary for consideration.

In the Advisory Action of November 10, 2005 and the Final Action of July 19, 2005, the Examiner indicates that the McAllister, et al. patent provides a capability to determine whether data on its data path has been received intact and on time. The Examiner states that data is sent on a routing link 40 of the McAllister, et al. patent. This is clearly not the case. A signaling link 38 of the McAllister, et al. patent carries signaling protocol messages while routing protocol messages are carried on the routing link 40. The actual traffic data is carried over a separate channel. The Examiner improperly equates the receipt of signaling and routing

protocol messages over the signaling link 38 and routing link 40 as a determination that the traffic data sent over the separate channel has been received intact and on time. However, the technique of the McAllister, et al. patent only verifies that the signaling link 38 and the routing link 40 are reliable through the proper receipt of the signaling and routing protocol messages. This technique provides no verification that the traffic data has been received on time let alone in an intact state. Moreover, because there is no capability to determine whether traffic data has been received intact and on time, the McAllister, et al. patent cannot send any message in response to receipt of the traffic flow let alone a message that indicates whether the traffic data has been received intact and on time. As the Examiner readily admits that the Cao, et al. patent provides no supporting disclosure with respect to these points, the proposed Cao, et al. - McAllister, et al. combination is insufficient to support a rejection of the claims in this Application.

Most notable of the legal errors present in the examination of the Application is a failure of the Final Office Action of July 18, 2005 and the Advisory Action of November 10, 2005 to establish a *prima facie* case of obviousness of the claims in the Application. There has been no mention of the three criteria for a *prima facie* case of obviousness as spelled out in M.P.E.P. §2143. The Examiner has not cited any language from the prior art that would suggest that the Cao, et al. and McAllister, et al. patents can be combined as proposed. In fact, the two cited references are incompatible with each other as the Cao, et al. patent is directed to destination switch protection routing while the McAllister, et al. patent is directed to source switch protection routing. The Examiner only provides a baseless subjective and conclusory "it would have been

obvious" statement for combining the Cao, et al. and McAllister, et al. patents without providing any objective reasoning or citing any evidence of record to support such a position. The Examiner has not provided any reasons how the proposed Cao, et al. - McAllister, et al. combination would have any expectation of success let alone a reasonable expectation of success. As shown above, the proposed combination fails to teach or suggest all of the claim limitations. As a result, the Examiner has failed to establish a prima facie case of obviousness in this Application.

CONCLUSION

Applicant has now made an earnest attempt to place this Application in condition for allowance. For the foregoing reasons and for other apparent reasons, Applicant respectfully requests allowance of all pending claims.

The Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of BAKER BOTTS L.L.P.

Respectfully submitted,

BAKER BOTTS L.L.P.

Attorneys for Applicant



Charles S. Fish

Reg. No. 35,870

November 21, 2005

Correspondence Address:

2001 Ross Avenue, Suite 600

Dallas, Texas 75201-2980

(214) 953-6507

Customer Number: 05073